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Abstracts of Recent Cases

20 of professional ethics looks with strong distaste upon any attorney who publicizes his case.[64] Canon 20, however, has been ineffective.[65] It not only has lacked enforcement but also it is inadequate in its phrasing. Canon 20 does not provide for news releases made by law enforcement officers, nor for news releases made to the radio or television media, nor does the canon strictly condemn all or a particular type of publicity but merely states that *generally* publicity is to be condemned.[66]

A new Canon 20 is needed. Since the bar has failed to enforce old Canon 20, enforcement of the new canon should be placed in the bench. Should the bench not wish to enforce the bar's ethics, the bench should adopt its own rules to police officers of the court who may divulge to news media information prejudicial to the accused. In either case, offenders could be cited for contempt.

The Criminal Court of Baltimore City, at one time, codified its rules provisions to preclude the divulgence of information prejudicial to the accused by officers of the court. The court's rule 904 stated:

> "In connection with any case which may be pending in the Criminal Court of Baltimore or in connection with any person charged with a crime and in the custody of the Police Department of Baltimore City or other constituted authority, upon charges of crime over which the Criminal Court of Baltimore has jurisdiction, whether before or after indictment, any of the following acts shall be subject to punishment as contempt. . .:
>
> C) The issuance by police authorities, the State's Attorney, counsel for the defense, or any other person having official connection with the case, of any statements or admissions made by the accused, or other matters bearing upon the issues to be tried.
>
> D) The issuance of any statement or forecast as to the future course of action of either the prosecuting authorities or the defense relative to the conduct of the trial."[67]

These rules do not apply to the press but affect only the sources of information that are within the court's power to control. The rules did not prevent all disclosures of police operations nor of court procedures, nor do they affect all sources of information. Nevertheless, as with the canons of ethics, the effectiveness of court rules depends on their enforcement. The Baltimore Court rules were repealed shortly after the *Baltimore Radio* case.[68]

Lastly, some hope for the future may be gained in educating the press in the evils of trial by newspaper in hope that good conscience will bring greater professional responsibility, which can only lead to self restraint.[69]

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the prosecutor are, Irvin v. Dowd, 359 U.S. 394 (1959), and Ciucci v. Illinois, 356 U.S. 571 (1959).

[64] Canon 20—Newspaper Discussion of Pending Litigation: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstance of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statements."

Cannons adopted by the American Bar Association at its Thirty-First Annual Meeting at Seattle, Washington, August 27, 1908.

[65] PHILLIPS & MCCOY, CONDUCT OF JUDGES AND LAWYERS, Ch.VIII, (1952).

[66] *Id.* at 162.

[67] Par. C & D, Rule 904, Supreme Bench of Baltimore City, 1947. Also cited in State v. Baltimore Radio Show, 193 Md. 300, 67 A.2d 497 (1949).

[68] The court's resolution reads:

> "The repeal of this Rule 904 shall not be construed to impair the power of the judges, from time to time assigned to the Criminal Court of Baltimore City, to punish for contempt."

No press informant was prosecuted under Rule 904 nor the resolution repealing it. Letter From Chief Judge Emory H. Niles to Author, September 3, 1959.

[69] This problem was discussed by newsmen attending the Northwestern University Short Course for Newsmen in Crime Reporting, Evanston, Illinois, March 23 through March 27, 1959. The course was sponsored by the Northwestern University Schools of Law and Journalism.

ABSTRACTS OF RECENT CASES

Death Sentence for Kidnapping Following Life Sentence for Murder Does Not Violate Due Process—Petitioner was convicted of murder and sentenced to life imprisonment. Subsequently, he pleaded guilty to a charge of kidnapping the murder victim, and he was sentenced to death. The Court of Criminal Appeals of Oklahoma affirmed the conviction and sentence. On *certiorari*, the United States Supreme Court affirmed, rejecting petitioner's argument that the sentence was imposed in violation of the due process clause of the fourteenth amendment. *Williams v. Oklahoma*, 358 U.S. 576 (1959).

The petitioner argued first that the trial court

violated statutory pre-sentencing procedure by permitting the state's attorney to make an unsworn statement concerning the details of the crime and petitioner's criminal record, and denying petitioner the rights of confrontation and cross-examination. The Supreme Court decided, however, that petitioner had waived his rights by failing to demand a hearing and by admitting the truth of the statements made against him.

Petitioner next contended that he would be punished twice for the same offense, inasmuch as the trial court had considered the murder in imposing sentence on the kidnapping charge. The Court held, however, that since kidnapping and murder were separate offenses under Oklahoma law, the trial judge was required to consider all the circumstances of the crime in determining punishment. Furthermore, it was noted, petitioner had not objected to the kidnapping charge on the grounds of former jeopardy but instead had entered a plea of guilty.

Petitioner urged, finally, that the lesser offense of kidnapping was merged in the greater offense of murder, and that the life sentence imposed for murder was a bar to the imposition of a greater sentence for kidnapping. The Court held, however, that the state had denominated kidnapping and murder as separate crimes, and that due process does not "require a State to fix or impose any particular penalty for any crime it may define, or impose the same or 'proportionate' sentences for separate and independent crimes."

New York Motion Picture Censorship Statute Declared Unconstitutional—After previous attempts at motion picture censorship had been declared unconstitutional, New York passed a new censorship law designed to meet the objections of the United States Supreme Court. The statute barred the exhibition of motion pictures which were "immoral" in that they portrayed acts of sexual immorality as desirable, acceptable, or proper patterns of behavior. Under the statute, the Motion Picture Division of the New York Education Department denied a license for the exhibition of the film "Lady Chatterley's Lover." The Court of Appeals of New York upheld the denial of the license to exhibit, interpreting the statute to require the denial of a license to a motion picture which portrays immoral conduct, in this case adultery, as right and desirable conduct for certain people under certain circumstances. The United States Supreme Court reversed, holding that advocacy of conduct proscribed by law does not justify denial of free speech when such advocacy falls short of incitement. *Kingsley International Pictures Corporation v. Regents of the University of the State of New York*, 27 U.S.L. WEEK 4492 (U.S. June 29, 1959).

The Court carefully avoided deciding whether any form of prior restraint on the exhibition of motion pictures is constitutional. However, the majority felt that "the deterrents ordinarily to be applied to prevent crime are education and punishment for violation of the law, not abridgement of the rights of free speech." Justices Black and Douglas in a concurring opinion, argued that all prior censorship of motion pictures is unconstitutional. Justice Frankfurter, concurring in the result, thought that the statute was constitutional but was unconstitutionally applied to the picture sought to be exhibited. He criticized the majority for striking down "the New York legislation in order to escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment." Justice Clark, concurring in the result, thought that the standard set forth in the New York statute was vague and hence unconstitutional. The New York legislature is left with the task of deciding whether any censorship statute can survive constitional objection.

Conviction of Murder in Second Degree Is Bar to Subsequent Prosecution for Murder in First Degree Despite Granting of Motion for New Trial—Petitioner was found guilty of murder in the second degree. Upon his motion, a new trial was granted, and at this trial he was convicted of murder in the first degree. Upon appeal, the Supreme Court of Washington reversed the conviction and remanded the cause for a new trial, holding that the jury verdict finding defendant guilty of murder in the second degree operated as an acquittal of the crime of murder in the first degree, and that the second trial thus placed petitioner in double jeopardy in violation of his rights under the state constitition. *State v. Schoel*, 341 P.2d 481 (Wash. 1959).

The prosecution contended that defendant's successful motion for a new trial operated as a waiver of his right to rely upon the first verdict as an acquittal of the more serious offense. The court rejected this contention, reasoning that if upon an acquittal in a fair trial, a defendant cannot be placed in jeopardy again for the same offense, the

same policy should protect him from a second jeopardy when he has been acquitted of a charge after a trial in which prejudicial error occurred. The court could see no reason why petitioner should be required to waive a valid defense in order to assert his constitutional right to appeal his conviction of a lesser crime which he alleged to be the result of error. This decision marks a retreat from previous holdings in the jurisdiction and is close to the position taken by the United States Supreme Court in *Green v. United States*, 335 U.S. 184 (1957).

Court Has Duty to Answer Questions of Jury Regarding Elements of Various Related Offenses—Petitioner was convicted of first degree murder for the shooting of the operator of a retail liquor store during an attempted robbery and was sentenced to death. The jury was confused as to the elements of felony murder and murder in the second degree, and as to the relationship between robbery and attempted robbery and the possible homicide verdicts. The trial judge refused to answer questions addressed to him by the foreman of the jury, offering only to repeat his blanket charge to the jury. The Court of Appeals of New York reversed, holding that the requested clarification should have been given and that if the court failed to understand the questions of the jury, it was obliged to direct further inquiry to them to ascertain their difficulties. *People v. Miller*, 160 N.E.2d 74 (N.Y. 1959).

Upon appeal, petitioner contended that the jury could have returned a verdict of murder in the first degree with a recommendation for leniency under the statute involved, but that under the charge given, without further explanation, it appeared that a recommendation of leniency was possible only upon a verdict of felony murder. The appellate court concluded that since the jury might, under the statute, "fit its verdict to the varying degrees of moral guilt" the trial judge's refusal to answer questions regarding possible verdicts was prejudicial error.

A further assignment of error involved the admission of testimony that the deceased had a wife and seven children. The statement was thought to be "calculated to appeal to the prejudice and sympathy of the jury." The Court of Appeals concluded that such testimony was improperly admitted since "the moral guilt of the defendant, not the moral goodness of the deceased" was the proper basis for the jury's verdict.

Prosecution for Aiding and Abetting Precluded if Woman Herself Performs Surgical Abortion—Defendant was convicted of the abortion of a woman who was ten weeks pregnant. No direct evidence was offered at the trial to prove that petitioner had committed the abortion, but there was testimony to the effect that the victim, unclad from waist to knees, was present in his apartment where she fainted, and that petitioner, aided by his girl friend, clothed the victim and took her, while unconscious, to the entrance of her apartment. An autopsy disclosed that the victim died of a massive inter-abdominal hemorrhage caused by two perforations of her uterus. Instructions were given to the jury that, even if petitioner were absent from his apartment when the abortion was performed, he could be found guilty of aiding and abetting the commission of the abortion. The Superior Court of New Jersey, Appellate Division, reversed, holding that the jury might have found that the woman herself had performed the abortion. Upon this finding a verdict against defendant would have been precluded, since the woman upon whom an abortion is performed is considered the victim and not the criminal under New Jersey law. Thus there would not have been a principal nor a crime which petitioner could aid or abet. *State v. Thompson*, 153 A.2d 364 (N.J. App. Div. 1959).

> The pertinent New Jersey statute provided that: Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or *uses any instrument whatsoever*, is guilty of a high misdemeanor. (Emphasis added.)

Interpreting the statute, the court insisted that, since the "prescribe, advise or direct" clause refers only to "any poison, drug, medicine or noxious thing," the petitioner could be found guilty of the crime of abortion only if he were found to have used the instrument which perforated the victim's uterus. Thus lack of presence in the apartment at the time of the abortion was a valid defense, and "if the jury understood from the charge that he could be convicted, although absent, no vestige of defense remained."

(For other recent case abstracts see pp. 403 and 429)